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Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S23–44 OF 2008
NANTHA BALAN JC
9 JULY 2015

C

Tort — Defamation — Pleadings — Plaintiff sued defendant for defamation — Defendant pleaded defences of justification and qualified privilege — Defendant sought to re-amend defence — Whether s 43 of the Evidence Act 1950 precludes defendant from relying upon criminal conviction of plaintiff as evidence in support of plea of justification in defamation proceedings — Whether particulars provided in proposed re-amended defence could be relied upon to prove impugned words — Whether evidence of subsequent events admissible for plea of justification and qualified privilege — Whether plaintiff 'libel-proof' — Evidence Act 1950 ss 43 & 55

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E

The plaintiff sued the defendant for defamation based on certain words that were allegedly spoken by the defendant during a political speech which he made in the course of the election campaign for the 12th Malaysian General Elections. The impugned words were 'PAS main DAP ikut kiri, DAP main PAS ikut kanan, Anwar main dua-dua ikut belakang' ('the impugned words'). In the present action, the defendant vide encl 97 had applied to re-amend his defence in respect of the issue of justification to include a 'lesser defamatory meaning', add further particulars to the existing plea of justification and qualified privilege and add a plea in mitigation of damages. In respect of this, the defendant relied on several events which occurred after the publication of the impugned words including the previous conviction of the plaintiff in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293. The issues for consideration were: (a) whether s 43 of the Evidence Act 1950 ('the Act') precludes a defendant from relying upon a criminal conviction of the plaintiff as evidence in support of the plea of justification in defamation proceedings; (b) whether the impugned words were capable of having lesser meaning as ascribed by the defendant by way of the proposed re-amended defence; (c) whether the particulars that had been provided in paras 8(i)–(viii) of the proposed re-amended defence supported the lesser meaning; (d) whether evidence of subsequent events admissible for plea of justification and qualified privilege; and (e) whether plaintiff was 'libel-proof'.

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Held, dismissing encl 97 with costs of RM5,000:

(1) Evidence of the plaintiff's criminal convictions for the purposes of establishing the plaintiff's reputation or disposition could not be admitted under s 55 of the Act. First, specific convictions are barred and secondly, only evidence of general reputation or disposition may be admitted. Thus, all references to the plaintiff's alleged homosexuality as stated or opined or concluded or suggested in the several cases referred to by the defendant in the proposed re-amended defence were barred by virtue of s 43 of the Act. In addition, the doctrine of 'libel-proof' only exists as part of the American law of defamation and has no application in Malaysia (see paras 57–58 & 124).

(2) The impugned words when viewed in context of the speech that was made and when set against the backdrop of the occasion when it was made (during a hotly contested political campaign), could also mean or imply that the plaintiff had a tendency to 'betray or play out his political partners or allies'. The court thus accepted that the impugned words had a lesser meaning. However, the words betrayal or playing out must necessarily be confined to the two opposition parties ie PAS or DAP. In the present case, the particulars in support of the proposed lesser meaning were not facts that support the sting of the libel or the truth of the impugned words in the context of the so-called lesser meaning, thus amendments were irrelevant and improper. The particulars could not be relied upon to prove that the plaintiff had betrayed or played out PAS and DAP (see paras 81, 84 & 104).

(3) For the purpose of plea of justification, the general rule is that, evidence of subsequent event could not be relied upon. However, in limited circumstances, it could be allowed. Most certainly, there must be some degree of consanguinity and proximity of time between the impugned events and the subsequent events. On the facts, the subsequent events ie the Federal Court conviction occurred long after the publication of impugned words, hence, it could not be relied upon for purposes of justification whether in respect of the extreme meaning or the lesser meaning. As for defence of qualified privilege, it was impermissible for the defendant to rely upon any subsequent event for this defence (see paras 109, 112 & 116).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan kerana fitnah berdasarkan perkataan-perkataan tertentu yang dikatakan telah diucapkan oleh defendan semasa ucapan politik yang dibuatnya sepanjang kempen pilihanraya untuk Pilihanraya Umum Malaysia ke-12. Kata-kata yang dipersoalkan adalah 'PAS main DAP ikut kiri, DAP main PAS ikut kanan, Anwar main dua-dua ikut belakang' ('kata-kata yang dipersoalkan'). Dalam tindakan ini, defendan melalui lampiran 97 telah memohon untuk meminda semula pembelaannya berhubung isu justifikasi untuk memasukkan 'lesser defamatory meaning',

menambah butiran selanjutnya kepada pli justifikasi dan perlindungan bersyarat sedia ada dan menambah pli untuk mitigasi ganti rugi. Berhubung itu, defendan bergantung kepada beberapa kejadian yang berlaku selepas penerbitan kata-kata yang dipersoalkan itu termasuk sabitan terdahulu plaintif dalam kes *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293. Isu-isu untuk dipertibangkan adalah: (a) sama ada s 43 Akta Keterangan 1950 ('Akta tersebut') menghalang defendan daripada bergantung kepada sabitan jenayah plaintif sebagai keterangan sokongan untuk pli justifikasi dalam prosiding fitnah; (b) sama ada kata-kata yang dipersoalkan mampu memberi maksud yang kurang sebagaimana yang dinyatakan oleh defendan melalui cadangan pindaan semula pembelaan itu; (c) sama ada butiran yang dikemukakan dalam perenggan 8(i)–(viii) kepada cadangan pindaan semula pembelaan menyokong maksud yang kurang itu; (d) sama ada keterangan kejadian berikutnya untuk pli justifikasi dan perlindungan bersyarat; dan (e) sama ada plaintif adalah 'libel-proof'.

Diputuskan, menolak lampiran 97 dengan kos RM5,000:

(1) Keterangan sabitan jenayah plaintif bagi tujuan membuktikan reputasi atau pembawaan plaintif tidak boleh diterima di bawah s 55 Akta tersebut. Pertama, sabitan spesifik telah dihalang dan keduanya, hanya keterangan reputasi atau pembawaan am boleh diterima. Oleh itu, semua rujukan kepada sifat homoseksual plaintif yang dikatakan itu sebagaimana dinyatakan atau diberi pendapat atau disimpulkan dalam beberapa kes yang dirujuk oleh defendan dalam cadangan pindaan semula pembelaan telah dihalang menurut s 43 Akta tersebut. Tambahan pula, doktrin 'libel-proof' hanya wujud sebagai sebahagian daripada undang-undang Amerika berhubung fitnah dan tidak terpakai di Malaysia (lihat perenggan 57–58 & 124).

(2) Kata-kata yang dipersoalkan apabila dilihat dalam konteks ucapan yang dibuat dan apabila diletak dengan berlatarkan kejadian apabila ia dibuat (semasa kempen politik yang diperdebatkan), hanya boleh bermaksud atau membayangkan bahawa plaintif mempunyai kecenderungan untuk 'betray or play out his political partners or allies'. Mahkamah dengan itu menerima bahawa kata-kata yang dipersoalkan mempunyai maksud yang kurang. Walau bagaimanapun, kata-kata mengkhianati atau bermain-main semestinya terhad kepada dua pihak pembangkang iaitu PAS atau DAP. Dalam kes ini, butiran sokongan cadangan maksud yang kurang itu bukan fakta yang menyokong sengat fitnah atau kebenaran kata-kata yang dipersoalkan dalam konteks maksud yang kurang itu, oleh itu pindaan adalah tidak relevan dan tidak wajar. Butiran itu tidak boleh dipercayai untuk membuktikan bahawa plaintif telah mengkhianati atau menipu PAS dan DAP (lihat perenggan 81, 84 & 104).

(3) Bagi tujuan pli justifikasi, rukun am adalah bahawa, keterangan untuk kejadian berikutnya tidak boleh digunakan. Walau bagaimanapun, dalam keadaan terbatas, ia boleh dibenarkan. Semestinya, terdapat tahap kaitan dan kedekatan masa antara kejadiaan yang dipersoalkan dan kejadian berikutnya. Berdasarkan fakta, kejadian berikutnya iaitu sabitan Mahkamah Persekutuan yang berlaku lama selepas penerbitan kata-kata yang dipersoalkan, justeru, ia tidak boleh digunakan bagi tujuan justifikasi sama ada berkaitan maksud ekstrim atau maksud yang kurang. Berhubung pembelaan perlindungan bersyarat, ia tidak boleh dibenarkan untuk defendan bergantung kepada mana-mana kejadian berikutnya bagi pembelaan ini (lihat perenggan 109, 112 & 116).]

Notes

For cases on pleadings, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 823–832.

Cases referred to

Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar & Anor [2001] 5 MLJ 48; [2000] 8 CLJ 10, HC (refd)

Barclays Bank Ltd v Cole [1966] 3 All ER 948, CA (refd)

Bennet v Newsgroup Newspapers Ltd [2002] EMLR 39, CA (refd)

Bonnick v Morris [2002] UKPC 31, PC (refd)

Cohen v Daily Telegraph Ltd [1968] 2 All ER 407; [1968] 1 WLR 916, CA (refd)

Cruise v Express Newspapers PLC [1999] QB 931, CA (refd)

DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22, HC (refd)

Dato Seri Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar Shah W-02–741 of 2000 (unreported), CA (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 AMR 185, FC (refd)

Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad [1999] 4 MLJ 58; [1999] 7 CLJ 32, HC (refd)

Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin [2014] 1 MLJ 911, HC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2014] 3 MLJ 254, CA (refd)

Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad [2001] 1 MLJ 305; [2001] 1 CLJ 519, CA (refd)

Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad [2001] 2 MLJ 65; [2001] 1 CLJ 663, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)

Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad [2007] 5 CLJ 11, HC (refd)

Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals [2015] 4 MLJ 34; [2015] AMEJ 886, CA (folld)

Datuk Seri Anwar bin Ibrahim v Datuk S Nallakaruppan & 2 Ors [2013] 1 LNS 991, HC (refd)
Chase v Newsgroup Newspapers Ltd [2002] EWCA Civ 1772, CA (refd)
GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd [2000] 1 WLR 2571, CA (refd)
Galloway v Telegraph Group Ltd [2004] EWHC 2786, QBD (refd)
Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action [1998] 3 SLR 337, CA (refd)
Goody v Odhams Press Ltd [1966] 3 All ER 369, CA (refd)
Hollington v F Hewthorn & Company Limited [1943] 2 All ER 35, CA (refd)
Jusoh v Ng Ah Sooi & Anor [1963] 1 MLJ 92 (refd)
Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim [2013] 4 MLJ 173; [2015] 3 AMR 432, CA (refd)
Lee Kuan Yew v Devan Nair [1990] 3 MLJ 452, HC (refd)
Loutchansky v Times Newspaper Ltd [2002] QB 321, CA (refd)
Maisel v Financial Times Ltd [1914–15] All ER Rep 671, CA (folld)
Mirzan bin Mahathir v Star Papyrus Sdn Bhd [2000] 6 MLJ 29, HC (refd)
Ong Tua Chor v Lee Beng Tong [1976] 1 MLJ 187 (refd)
Plato Films Ltd and Others v Speidel [1961] 1 All ER 876, HL (refd)
Ramanathan Chelliah v Penyunting, The Malay & Anor [1998] MLJU 503; [1998] 2 CLJ 691, HC (refd)
Scott v Sampson [1881–5] All ER Rep 628 (refd)
She Eng Gek v D A De Silva [1957] 1 MLJ 55 (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Evidence Act 1950 ss 43, 52, 55
Penal Code s 377B
Road Transport Act 1985 s 41
Rules of Court 2012 O 20 r 5
Rules of the High Court 1980 O 20 r 5

Leela Jesuthasan (Faiz & Co) for the plaintiff.
Muhammad Shafee Abdullah (Sarah Maalini Abishegam with him) (Shafee & Co) for the defendant.

Nantha Balan JC:

INTRODUCTION

[1] This is an application by the defendant to re-amend his defence ('encl 97'). This application raises the following issues:

(a) whether s 43 of the Evidence Act 1950 precludes a defendant from relying upon a criminal conviction of the plaintiff as evidence in support of the plea of justification in defamation proceedings;

(b) whether in defamation proceedings a defendant is entitled to rely upon post publication events in support of a plea of justification and/or qualified privilege;

(c) whether particulars in support of a lesser meaning must have a causal connection to the impugned words which formed the basis for the proposed lesser meaning or alternatively whether the defendant can rely on the plaintiff's conduct in a general sense and which are not be related to the lesser meaning;

(d) whether particulars in support of a lesser meaning may include post publication events;

(e) whether the concept of 'libel-proof plaintiff' is part of Malaysian jurisprudence on defamation;

(f) whether in a defamation action a plaintiff's conviction for a criminal offence may be relied upon for purposes of establishing the plaintiff's character under s 55 of the Evidence Act 1950; and

(g) whether the plaintiff's conviction in respect of a criminal offence which took place after the publication of the impugned words are relevant and admissible and may therefore be pleaded for purposes of mitigation of damages under s 55 of the Evidence Act 1950.

THE YAMAHA PRINCIPLE

[2] I will start by setting out the principles relating to an amendment which requires leave of the court under O 20 r 5 of the Rules of Court 2012. In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, the Federal Court had set out the relevant criteria which must be met in order for an amendment to be allowed under O 20 r 5 of the Rules of the High Court 1980 which is pari materia with O 20 r 5 of the Rules of Court 2012. In that case, Mohd Azmi FCJ set out the following criteria as a guide which should inform the judge's discretion:

(a) whether the application for amendment was bona fide?

(b) whether the prejudice to the other side can be compensated by costs? and

(c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character?

THE PLAINTIFF'S ACTION

[3] The plaintiff's action against the defendant is for defamation and is based on certain words that were allegedly spoken (in Bahasa Malaysia) by the defendant during a political speech which he made in the course of the election campaign for the 12th Malaysian General Elections ('the GE'). The speech by the defendant was allegedly delivered on 20 February 2008 during a political gathering which was held in the parliamentary constituency of Lembah Pantai, Kuala Lumpur.

[4] The political gathering was organised by the ruling party Barisan Nasional ('BN') and the defendant was one of the speakers at the political gathering (see para 3 of the defence). At the material time the plaintiff was the advisor to the Parti Keadilan Rakyat ('PKR'). He was not a candidate in the GE. PKR was at the material time aligned with two other opposition parties, namely Parti Islam Se-Malaysia ('PAS') and the Democratic Action Party ('DAP').

[5] The plaintiff and defendant are both prominent politicians in the Malaysian political landscape. The plaintiff's credentials and accomplishments are as stated in paras 1 and 2 of the statement of claim ('SOC'). I shall not regurgitate them here. The defendant was at the material time the Deputy Head of the Youth Division of the United Malays National Organisation ('UMNO') which is the major component party of BN.

[6] The original text of the defendant's speech in Bahasa Malaysia and the impugned words which are the subject matter of the suit is/are as follows:

> Saya rasa meluat, bila saya tengok tiap-tiap kali sebelum pilihanraya, Parti Pembangkang bergabung. Sebelum tahun 99, pilihanraya bergabung, Barisan Alternatif, lepas tu cerai. Tahun 2004 sebelum pilihanraya, bergabung, selepas itu cerai. Tahun 2008 saya dengar nak bergabung, sekali lagi confirm lepas ini akan cerai. Dalam Barisan Nasional, UMNO, MCA, MIC, Gerakan, PPP, kita kahwin selama-lamanya. Kita tak pernah cerai. Kita kahwin pada tahun 1955 dengan MCA dengan MIC, sampai hari ini kita tak cerai, tapi Pembangkang ini saudara-saudara, mungkin Dato Norza tahu istilah ini, Pembangkang ini dia kahwin muta'ah, kahwin muta'ah ini saudara-saudara, mazhab shiah, dia mengamalkan kahwin muta'ah, dia kahwin satu malam, dia main malam itu, esok hari dia cerai untuk menghalalkan maksiat.
>
> Parti Pembangkang ini dia kahwin muta'ah. Dia kahwin, *PAS main DAP ikut kiri, DAP main PAS ikut kanan, Anwar main dua-dua ikut belakang*, lepas itu bila kalah dia cerai. Ini bukan untuk masa depan kita saudara-saudara. (Emphasis added.)

[7] The plaintiff has taken offence with the words, 'PAS main DAP ikut kiri, DAP main PAS ikut kanan, Anwar main dua-dua ikut belakang'. I shall

refer to them as 'the impugned words'. A literal translation of these words is: 'PAS plays DAP from the left, DAP plays PAS the right. Anwar plays both of them from behind'.

[8] The plaintiff acted quickly and the suit for defamation was promptly filed on 7 March 2008. According to the plaintiff, the impugned words are defamatory of the plaintiff. The plaintiff has pleaded that in their natural and ordinary meaning, the impugned words meant and were understood to mean, inter alia, that:

(i) the plaintiff had engaged in carnal intercourse with a male partner or partners against the order of nature which is an offence unders as defined under section 377A and 377D of the Penal Code punishable with imprisonment and whipping;

(ii) the plaintiff was an homosexual;

(iii) that the plaintiff was engaged in activities contrary to Islam and was further guilty of an offence of liwat under section 25 of the Syariah Criminal Offence (Federal Territories) Act, 1997 which is punishable by imprisonment and whipping.

(iv) that the plaintiff was a pervert and/or of no morals;

(v) that the plaintiff was unfit to hold political, or any office;

(vi) the plaintiff was a person of criminal tendencies; and

(vii) that the plaintiff was dangerous to Malaysian society.

(See para 5 of the statement of claim.)

[9] In para 6 of the statement of claim, the plaintiff has pleaded an *innuendo meaning* and it reads as:

6. By innuendo, the offending words were and are defamatory and or libellous of the plaintiff and were meant and were understood to, inter alia, mean that:

(i) the plaintiff had engaged in carnal intercourse with a male partner or partners against the order of nature which is an offence as defined under section 377A and 377D of the Penal Code punishable with imprisonment and whipping;

(ii) the plaintiff was an homosexual;

(iii) that the plaintiff was engaged in activities contrary to Islam and was further guilty of an offence of liwat under section 25 of the Syariah Criminal Offence (Federal Territories) Act, 1997 which is punishable by imprisonment and whipping. (The plaintiff will refer to all relevant statues at all interlocutory proceedings and at the trial);

(iv) that the plaintiff was a pervert and/or of no morals;

(v) that the plaintiff was unfit to hold political, or any office;

(vi) the plaintiff was a person of criminal tendencies; and

(vii) that the plaintiff was dangerous to Malaysian society.

[10] According to the plaintiff, the impugned words impute, inter alia, that the plaintiff is a homosexual, immoral and unfit to hold public office and are irrefutably defamatory of the plaintiff and were uttered so as to disparage the plaintiff not only in his personal status, but in his office and shut him out of politics.

THE FIRST APPLICATION TO AMEND THE DEFENCE

[11] The defendant filed his defence on 8 October 2010 ('the original defence') wherein he raised, the defences of justification, qualified privilege and estoppel. There is a reason why the original defence was filed more than two years after the suit was filed and papers served on the defendant. There was a procedural mishap on the defendant's part which led to judgment (on liability) being entered against the defendant. It was very much later after several appeals that the judgment in default was set aside and leave was granted for the defendant to file his defence out of time.

[12] The present application is the second amendment application. By the first amendment application which was filed on 11 September 2013, the defendant sought to amend his defence to include facts and particulars relating to various criminal proceedings and convictions involving the plaintiff.

[13] To put it pithily, by the first amendment application, the defendant was seeking, inter alia, to rely on a lesser meaning and on certain remarks that were made by the court in the grounds of judgment in previous criminal proceedings involving the plaintiff in order to establish that there was justification for the utterances made by the defendant which either expressly or implicitly suggested that the plaintiff was a homosexual. However, the defendant had not identified the lesser meaning nor did he provide the requisite particulars.

[14] The defendant's first amendment application which was filed on 11 September 2013 was dismissed by the High Court on 9 October 2013. The decision of the High Court is reported as *Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin* [2014] 1 MLJ 911. His appeal to the Court of Appeal was dismissed on 20 August 2014. The grounds of judgment of the Court of Appeal have been reported as *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173; [2015] 3 AMR 432.

[15] The defendant then appealed to the Federal Court in respect of only part of the Court of Appeal's decision, namely in respect of the plea of 'partial justification'. Pursuant to an order by the Federal Court on 20 October 2014, the defendant was given leave to refer to two questions of law to the Federal Court which arose out of the first amendment application.

[16] The questions of law, in respect of which leave was given are as follows:

(a) whether the common law defence of 'partial justification' as propounded in *Goody v Odhams Press Ltd* [1966] 3 All ER 369 is available as a defence in Malaysia against any defamation actions ('first question'); and

(b) do the amendments by the applicant/defendant fall within the applicable and legal parameters (which enable amendments) of the three-fold test in *Yamaha Motors* and O 20 r 5 of the Rules of Court 2012 where 'partial justification' was proposed in the amendments (at para 12 of the proposed amended defence) based on specific findings in the Federal Court in the decision of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737 which was upheld in the Federal Court in 2014 in Criminal Application No 07–2–03 of 2013 (W) upon the respondent attempting to expunge the specific paragraph in the said 2004 Federal Court decision ('second question').

[17] At the conclusion of the substantive appeal on 6 April 2015, the Federal Court answered the first question in the affirmative and declined to answer the second question. Following the ruling of the Federal Court the defendant then proceeded to amend the defence ('the amended defence').

[18] The amendment to the defence that was made consequent upon the decision of the Federal Court in relation to the plea of partial justification reads as follows:

> 10A. In so far as the words complained of allege that the plaintiff was defamed in the meaning pleaded in para 5(i) to (iii) and para 6(i) to (iii) in the statement of claim, the defendant contends that the decision of the Federal Court pleaded in para 10(i) above is relevant on the issue of the plaintiff's homosexual conduct and in so far that they are the subject matter of comments by the courts in the land they are true in substance and in fact.
>
> 10B. The defendant will, if necessary, rely on s 8 of the Defamation Act 1957.

THE SECOND AMENDMENT APPLICATION ('ENCL 97')

[19] By the present application which is before me ('encl 97'), the defendant seeks in particular to re-amend his defence in respect of the issue of justification

to include a '*lesser/lower defamatory meaning*', *add further particulars to the existing plea of justification and qualified privilege* and add a *plea in mitigation of damages*. In this regard, the defendant intends to rely on several events which occurred after the publication of the impugned words (see paras 2A, 7, 8, 9, 9A 10 and 11 of the proposed re-amended defence).

[20] By the present application for amendment ('encl 97'), the defendant seeks to rely in particular on the decision of the Federal Court which was handed down on 10 February 2015 in respect of Criminal Appeal No 05–47–03 of 2014(W) and Criminal Appeal No 05–48–03 of 2014(W) whereby the plaintiff's appeal against the decision of the Court of Appeal which reversed the decision of the High Court to acquit him on a charge of sodomy under s 377B of the Penal Code, was dismissed. Section 377B of the Penal Code reads as follows:

> Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

[21] The decision of the Federal Court has since been reported as *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 AMR 185. I shall refer to this matter as 'the Federal Court conviction'. As a consequence of the Federal Court conviction, the plaintiff was sentenced to serve a prison sentence of five years for the offence under s 377B of the Penal Code.

[22] However, the plaintiff vehemently maintains that the defendant is not entitled to rely on the Federal Court conviction as that conviction is deemed irrelevant by virtue of s 43 of the Evidence Act 1950. It was also submitted for the plaintiff that subsequent events are inadmissible for purposes of justification or qualified privilege. As for the defendant's reliance on the plaintiff's conviction for purposes of mitigation, it is the plaintiff's stand that under s 55 of the Evidence Act 1950, only evidence of the plaintiff's general reputation and disposition is relevant and admissible and that specific information relating to convictions are not relevant and admissible.

[23] Also the defendant has pleaded a 'proposed lesser meaning' and is seeking to rely on a set of facts and circumstances so as to support his plea of justification based on a 'lesser meaning'. The lesser meaning that the defendant seeks to suggest in the present context is that the impugned words only convey the meaning that the plaintiff has the tendency to 'play out his political partners' or 'betray his political partners'.

[24] This is how the lesser meaning has been pleaded in para 8 of the proposed re-amended defence:

(1) that the plaintiff was and is untrustworthy in political relationships as he is in the habit of playing his political partners out or not keeping to his words/ promises in any political understanding with his political partners and/or his political opponents;

(2) the plaintiff cannot be trusted in any political partnership and in particular in the partnership of Pakatan Rakyat (PR), as the plaintiff, being the alter ego of PKR, a component party in the coalition/partnership would 'play out' his said political party partners for his own selfish gain;

(3) that the plaintiff has a long track record and is still continuing to betray his political partners and this habit of his is continuing into his current partnership in PR.

[25] For the defendant it was submitted that he should be allowed to rely on the lesser meaning as the impugned words, if taken literally would mean that the plaintiff was capable of sodomising PAS and DAP which are both political parties and as such the words would be illogical and meaningless.

[26] Hence by that argument it was contended for the defendant that the impugned words in fact bear a lesser meaning in the manner ascribed by the defendant in the present application for which he now seeks to include all relevant facts which he claims will support the lesser meaning so as to comply with O 78 r 3(2) of the Rules of Court 2012.

[27] In the proposed re-amended defence, the particulars in support of the lesser meaning are as follows:

PARTICULARS

i) The plaintiff had betrayed Datuk S Nallakaruppan when he asked Datuk S Nallakaruppan to stand for Vice Presidency in his opposition party and to contest in the Ijok by election. When Datuk S Nalakaruppan obtained the second highest nomination, the Plaintiff without reason asked Datuk S Nallakaruppan to withdraw and thereby played out the latter with consequent political and personal; embarrassment as well to the latter;

ii) The plaintiff and Datuk S Nallakaruppan were the best of friends throughout the time when Datuk S Nallakaruppan knew the plaintiff. The plaintiff had deceived and 'played out' Datuk S Nallakaruppan to achieve his own political agendas with the ultimate aim of becoming the Prime Minister of Malaysia;

iii) The plaintiff was instrumental to the formation and/or encouragement of

and endorsed the movement of the Hindu Rights Action Force ('Hindraf') and rode on its struggle in the 2008 General Election. The plaintiff personally appeared in the Klang Magistrate Court to lend support for Uthayakumar, the Hindraf leader when the latter was charged for sedition. The plaintiff used the Hindraf's struggle and public sentiment thereby created in the 12th General Elections in 2008. The Plaintiff did all this for the purposes of his own political agendas but later on labelled the Hindraf movement as racist;

iv) When the plaintiff was the Deputy Prime Minister of Malaysia, the plaintiff had publicly showed support for the former Prime Minister Tun Dr Mahathir Mohamad, yet behind the scenes he was scheming to topple him. The way in which the plaintiff sought to achieve this was to give the appearance that he was in support of Tun Mahathir when in fact he was always scheming with local political powers and foreign powers to topple Tun Mahathir and to usurp the position as the Prime Minister of Malaysia;

v) The 16th September, 2008 (alleged changing of political power) was orchestrated by the plaintiff as a much awaited date where the plaintiff could reach his aspirations of forming a new government and becoming its leader and ultimately the Prime Minister of Malaysia. During the build-up phase to 16th September 2008; the plaintiff tried to garner as much support as he could not only from his 'Pakatan Rakyat' members but from members of Parliament of the Barisan Nasional Coalition. In his attempt to garner support the Plaintiff had even misled his own followers of the 'Pakatan Rakyat' Coalition. By these actions the plaintiff misrepresented and/or misled many quarters of the PR and some BN Coalition members in order to garner support when the Plaintiff was conscious and aware that he had not got the necessary numbers in Parliament at all material times to cause a change;

vi) The plaintiff claimed that there were phantom voters in the general election 2013, namely that Barison Nasional were illegally bringing in massive numbers of foreigners mostly from Bangladesh to vote for the Barisan Nasional Component party in the 2013 General Elections. The dominant aim of such a false claim was not only to mislead the public and to create public anger against Barisan Nasional but to mislead his own political partners such as PAS and DAP so that, his said political partners emotions could be whipped up in order to trigger a momentum towards a nationwide distrust of Barisan Nasional and/or the Election process as a whole. He played out his political partners by not telling them the truth. The Plaintiff subsequently denied that he had made this claim subsequently;

vii) The plaintiff had reneged on a peace deal to respect the outcome of the Elections in 2013 that the plaintiff himself had brokered between the leader of the Barisan Nasional Component party Datuk Seri Najib Razak in April of that year; and

viii) The plaintiff as the leader of his political party PKR orchestrated the 'Kajang Move' to replace Tan Sri Abdul Khalid Ibrahim as the Chief Minister of the Selangor State with himself following numerous complaints orchestrated against Tan Sri Abdul Khalid Ibrahim for allegedly running the State unilaterally without consulting PKR as well as the national Pakatan Rakyat leadership, when such complaints orchestrated by the plaintiff through PKR were devised by the plaintiff with the predominant purpose of placing the plaintiff as the Chief Minister of the Selangor State to further his own personal and/or selfish agendas and ultimately satisfying the needs of the Plaintiff and that of his family.

THE FEDERAL COURT CONVICTION

[28] I shall deal with the first issue which has to do with the defendant's reliance on the Federal Court conviction for purposes of the defence of justification. As stated earlier, the plaintiff objects to the introduction and reliance on the Federal Court conviction based on s 43 of the Evidence Act 1950 as it is inadmissible in civil proceedings. The other objection that the plaintiff takes with respect to the Federal Court conviction is the fact that the alleged events which gave rise to the criminal charge against the plaintiff under s 377B of the Penal Code is a subsequent event as it had occurred very much after 20 February 2008.

[29] As such the plaintiff maintains that the defendant is not entitled to rely on events which occurred after the publication of the impugned words which are said to be defamatory of the plaintiff. I will first deal with the plaintiff's objection under s 43 of the Evidence Act 1950. Section 43 of the Evidence Act 1950 provides as follows:

> Judgments, orders or decrees other than those mentioned in sections 40 to 42 are irrelevant unless the existence of such judgment order or decree is a fact in issue or is relevant under some other provision of this Act.

[30] In this regard, I was referred to a number of authorities relating to the subject of admissibility of findings/convictions in civil proceedings. In Malaysia, the position has been that criminal convictions are inadmissible in civil proceedings. See:

(a) *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2014] 3 MLJ 254 (CA);

(b) *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22;

(c) *Dato Seri Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar Shah* W-02-741-2000 (unreported) (CA);

(d) *Jusoh v Ng Ah Sooi & Anor* [1963] 1 MLJ 92;

(e) *Ong Tua Chor v Lee Beng Tong* [1976] 1 MLJ 187; and

(f) *She Eng Gek v D A De Silva* [1957] 1 MLJ 55.

[31] However, there are also cases which have ruled that criminal convictions are admissible in civil proceedings. See:

(a) *Ramanathan Chelliah v Penyunting, The Malay & Anor* [1998] MLJU 503; [1998] 2 CLJ 691 at pp 694–695 (HC);

(b) *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [1999] 4 MLJ 58 at pp 66 and 68; [1999] 7 CLJ 32 at pp 37 and 39 (HC);

(c) *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 1 MLJ 305 at p 310; [2001] 1 CLJ 519 at p 523 (CA);

(d) *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65 at p 67; [2001] 1 CLJ 663 at pp 665–666 (FC); and

(e) *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad* [2007] 5 CLJ 118 at p 124 (HC).

[32] The position at common law is that criminal convictions are irrelevant for purposes of civil proceedings and the principle in this regard is to be found in the seminal case of *Hollington v F Hewthorn & Company Limited* [1943] 2 All ER 35 which has been followed in a number of Malaysian cases which were referred to earlier.

[33] Before going further, I have the following comment to make with regards to the decision in *Ramanathan Chelliah v Penyunting, The Malay & Anor* [1998] MLJU 503; [1998] 2 CLJ 691. In that case, the learned judge had declined to follow *Hollington*'s case and ruled that the plaintiff's conviction for outrage of modesty was relevant and therefore admissible for purposes of the libel action against the editor of the newspaper. Section 43 of the Evidence Act 1950 was not referred to or discussed in that case. In *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [1999] 4 MLJ 58; [1999] 7 CLJ 32, the very same judge had allowed the defendant in that case to refer to the convictions of two other persons (Munawar and Sukma) for acts of gross indecency involving the plaintiff. However, there was no discussion about s 43 of the Evidence Act 1950 or *Hollington*'s case.

[34] Finally, in *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22, the very same judge came to an opposite conclusion with regards to reliance on criminal convictions (and the comments by the Court of Appeal whilst acquitting the plaintiff) and held that these matters cannot be referred to by reason of ss 43 or 55 of the Evidence Act 1950. There was no discussion on *Hollington*'s case. The learned judge made no reference to his earlier decisions

touching upon the same subject when he had ruled the other way.

[35] In *Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar & Anor* [2001] 5 MLJ 48; [2000] 8 CLJ 10, the same judge took the position that the plaintiff's criminal conviction was admissible. The learned judge relied on his own decision in *Ramanathan Chelliah* and held that the s 43 of the Evidence Act 1950 and the rule in *Hollington*'s case did not bar any reference or reliance upon the criminal conviction. The learned judge also opined that subsequent events may be relied upon. The case of *Cohen v Daily Telegraph* [1968] 2 All ER 407 was cited for that proposition.

[36] In my view, the controversy regarding the rule in *Hollington*'s case and s 43 of the Evidence Act 1950 is still raging and the dust of conflicting judicial opinion in this area of the law does not appear to have settled. In view of the importance of *Hollington*'s case, it is, I think necessary that we closely examine the facts which led the English Court of Appeal to rule that criminal convictions are not admissible in civil proceedings. The facts of the case and the controversy surrounding the rule are neatly discussed in an article by Wendy Morre Mandel — 'The admissibility of criminal convictions in civil cases'.

[37] The article reads as follows:

> Hollington involved a defendant driver of a vehicle involved in a collision with the plaintiff's car. The plaintiff's car was driven by the plaintiff's son. The only witnesses of the collision were the two drivers. The defendant driver was convicted of careless driving, contrary to the Road Traffic Act 1930. A certificate of conviction was issued against the defendant driver by a magistrate's court. The plaintiff then commenced a civil action for the damage done to his vehicle in the collision. In his defence of the civil matter, the defendant denied any negligence arising out of the collision and pled that the driver was contributory negligent for having caused the collision.
>
> The operator of the plaintiff's vehicle died prior to trial. Hence the plaintiff could not call any witness about the circumstances of the collision and was unable to provide any direct evidence of the defendant's negligence.
>
> Therefore, at trial, the plaintiff sought to introduce the certificate of the defendant's careless driving conviction as evidence, not only of the conviction itself, but of the material facts upon which the conviction was based.
>
> At the trial level, Hilbery J ruled that the evidence of a conviction of the defendant driver of careless driving, at the time and place of the subject collision, was inadmissible because it was 'Res Inter Alios Act' (a doctrine which holds that a matter between others is not our business).
>
> Hilbery J also ruled against the admissibility of a statement made to the investigating police by the driver of the plaintiff's vehicle (now deceased).
>
> Despite ruling that the prior conviction was inadmissible and that a statement made to police by the now deceased driver of the plaintiff's vehicle was not admissible,

Hilbery J found that the plaintiff had established a prima facie case of negligence against the defendant and gave judgment in the plaintiff's favour. The defence appealed the decision.

On appeal, the plaintiff sought to uphold the judgment of Hilbery J, but also contended that the evidence tendered by him at trial was wrongly excluded.

The plaintiff argued that if the appellate court should find that there was no evidence to support the judgment, there should be a new trial where the previously rejected evidence tendered by the plaintiff (the criminal conviction) could be admitted. The plaintiff, represented by Mr Denning (as he then was), argued that the Court of Appeal ought to consider whether it was a legitimate inference that the defendant was negligent and if so, the matter would end. Alternatively, the plaintiff argued that the court should determine whether a conviction of the defendant of careless driving was admissible at common law.

Mr Denning argued that he was entitled to put the conviction in evidence, not as conclusive, but as prima facie evidence that the defendant was driving negligently. Mr Denning admitted that he must prove by oral evidence, if it is not admitted, that the defendant is the person who was convicted. He admitted that he would have to causally link the defendant's negligence with the accident. He admitted that the conviction would not be an estoppel, because it was open to the defendant to demonstrate that he ought not to have been convicted or that his negligence was not the cause of the accident. However, Mr Denning urged the appellate court to consider that the fact of the defendant's conviction was prima facie evidence that the defendant was guilty of negligence.

The Court of Appeal held that the prior criminal conviction was rightly rejected as evidence in the civil case. The Court of Appeal found that the inference of Hilbery J was not justified and, based on the evidence before Hilbery J, could not support a finding of negligence against the defendant.

The Court of Appeal reasoned that the conviction was rightly rejected because a civil court would have to review all the evidence that was before the criminal court before it could give any weight to the prior conviction. The civil court would not know about the evidence that was before the criminal court in arriving at its decision.

Hence, how could such evidence be given any weight? Further, to link the defendant's negligence and the actual accident (an issue that would not have been a requirement in the criminal case) would require the civil court to call substantially the same evidence. Therefore, proof of the conviction was no more that proof that another court came to a conclusion that the defendant was guilty. The opinion of the criminal court that the defendant was negligent — was not relevant; it was merely the opinion of another judicial body. The Court of Appeal explained:

> In many, perhaps in most cases, the correctness of the conviction would not be questioned, but where it is, its value can be assessed only by a retrial on the same evidence. However convenient the other course may be, it is in our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal.

The Court of Appeal also considered that the prevailing law had long established the rejection or prior criminal convictions into evidence and explained:

> Where it is clear that over a long period there has been a unanimous opinion, not only of most modern text-book writers, but among judges of first instance, that some particular class of evidence is admissible, the court should be slow to differ from it unless it can be clearly shown that the communis opinion, which we are satisfied has hitherto prevailed, is based on wrong premises.

The Court of Appeal also considered that if it agreed that a conviction ought to be admitted as prima facie evidence because the facts have been investigated and the results of the investigation have established facts, then it ought to be open to a defendant who has been acquitted as proof that the criminal court was not satisfied of his or her guilt.

The use of a 'quid pro quo' example, to demonstrate that the civil court can get no real guidance from the former criminal proceedings without retrying the criminal case is questionable in light of the different burden of proof in criminal and civil courts. An acquittal in a criminal court may still be a conviction on a lower civil standard. Nonetheless, the example was given and the decision made to refuse the admission of a criminal conviction.

Since its creation, the rule in *Hollington v Hewthorn* has been influential in many jurisdictions, although widely criticised. (Emphasis added.)

[38] Turning now to the rule in *Hollington*'s case and its place in Malaysian jurisprudence, it was argued for the defendant that *Hollington*'s case does not represent the current judicial thinking on the topic of admissibility of convictions under a criminal case in civil proceedings and that in keeping with the adverse comments made by Lord Denning MR in *Goody v Odhams Press Ltd* [1966] 3 All ER 369 and *Barclays Bank Ltd v Cole* [1966] 3 All ER 948, and the developments which have taken place in other commonwealth jurisdictions, this court should decline to follow *Hollington*'s case.

[39] The next point that was argued by the defendant is that when the reputation of the plaintiff is in issue in civil proceedings then his convictions under criminal proceedings are relevant and admissible by virtue of ss 52 and 55 of the Evidence Act 1950:

Section 52 of the Evidence Act 1950 *reads as follows*:

In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except so far as his character appears from facts otherwise relevant.

Section 55 of the Evidence Act 1950 *reads as follows*:

In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant.

Explanation — In ss 52, 53, 54 and 55 the word 'character' includes both reputation and disposition; but, except as provided in s 54, *evidence may be given only of general reputation and general disposition*, and *not of particular acts* by which reputation or disposition is shown. (Emphasis added.)

[40] The entire argument of the parties herein relating to *Hollington*'s case, ss 43, 52 and 55 of the Evidence Act 1950 appears to me to be somewhat of a regurgitation of the arguments that were made in a similar case involving the same plaintiff, where counsel for the defendant herein also appeared in that case. The case that I am referring to is *Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals* [2015] 4 MLJ 34; [2015] AMEJ 886 where in a judgment dated 29 May 2015, the Court of Appeal speaking through the learned Justice Dato Abdul Aziz bin Abdul Rahim JCA, had unanimously ruled, in the context of a striking out application, that *Hollington*'s case is still a good law in Malaysia and it will require statutory intervention for the principle in that case to be discarded. I shall refer to this case as 'the *Nallakaruppan* case'.

[41] This was an appeal from the decision of the High Court which is reported as: *Datuk Seri Anwar bin Ibrahim v Datuk S Nallakaruppan & 2 Ors* [2013] 1 LNS 991 (HC). In the *Nallakaruppan* case, the Court of Appeal noted that in jurisdictions such as England and Singapore *Hollington*'s case was overruled by statutory intervention.

[42] The Court of Appeal examined all the relevant case law and the statutory provisions under the Evidence Act 1950 and concluded that under s 43 of the Evidence Act 1950, convictions in criminal proceedings are irrelevant and inadmissible for purposes of civil proceedings. The Court of Appeal also held that convictions in criminal proceedings may not be admitted in civil proceedings pursuant to ss 52 and 55 of the Evidence Act 1950.

[43] It is I think, important to understand the entire discussion that took place in the *Nallakaruppan* case and the views that were articulated by the court. As such I feel it is necessary to refer to several passages from the judgment in the *Nallakaruppan* case, which deal with the issues which are under discussion in the present context:

[11] Having read and re-read s 43 above, we are of the view that there is no ambiguity in the section that as a matter of evidence, judgment, order or decree is irrelevant except where the existence of such judgment, order or decree is a fact in issue or that such judgment, order or decree is relevant under some other provisions of the Act. With respect to the last limb of s 43 which reads '... or is relevant under some other provisions of this Act', we will come back to address this later. For the time being, suffice for us to say that the only exception, if we may use that expression, that makes judgment, order or decree relevant under s 43 as a matter of evidence is where the judgment, order or decree is relevant for the purpose of ss 40,

41 and 42 of the Evidence Act 1950. However, neither of those three sections are in issue in these appeals and therefore not applicable; nor the judgment in question is a fact in issue.

[12] We have stated earlier that s 43 of the Evidence Act is embodiment of the common law laid down by the *Hollington*'s case. Learned counsel for all the defendants submitted that, we should depart from the rule in *Hollington*'s case in so far as it is relevant to the interpretation or application of s 43 of the Evidence Act. In arguing this proposition it was submitted that the *Hollington*'s case had been criticised heavily by later cases 'for its total lack of logic and sense' and therefore no longer good law. To support this argument, reference was made to the views expressed by Lord Denning MR in *Goody v Odhams Press Ltd* [1966] 3 All ER 369.

And also in the case of *Barclays Bank Ltd v Cole* [1966] 3 All ER 948. In these two cases, Lord Denning MR had expressed the view that the legal position of the *Hollington*'s case rule on the relevancy of a criminal judgment or decision in a civil proceeding or action should be reviewed. In fact very much later the law in England on this point was changed by way of legislative intervention as recommended by the Law Reform Committee.

[13] Learned counsel for the defendants also pointed out to us that the highest Court in New Zealand had also criticised *Hollington*'s case as early as 1969 in the case of *Joergensen v News Media (Auckland) New Zealand Ltd* [1969] NZLR 961 and had refused to follow it. It was further submitted that closer to home, Singapore has an identical provision to our s 43 of the Evidence Act and that Singapore has overcome the problem posed by their s 45 of the Evidence Act by a legislative amendment with the introduction of s 45A. Learned counsel for the defendants cited the Singapore case of *Choo Michael v Loh Shak Mow* [1994] 1 SLR 584, where the learned High Court judge had expressed the opinion that *Hollington*'s case would definitely have been overruled by the House of Lords.

[14] However, we make two observations. First, though Lord Denning MR in the two English cases cited by the defendants counsel had been critical of the *Hollington*'s case decision on the issue, the Master of the Rolls did not go so far as to say that it was no longer good law then. In fact in *Barclays* the Master of the Rolls said in respect of the rule in *Hollington*'s case: '... it is made possible by the unfortunate decision of the court in *Hollington v F Hewthorn Co Ltd* where it was held that a conviction in a criminal court cannot be used as evidence, not even prima facie evidence in a civil case. I hope that it soon will be altered.

[15] It is observed that in *Barclays* the other two Lord Justices ie Dankwert LJ and Salmon LJ although agreeing with Lord Denning MR's criticisms of *Hollington*'s case also did not make any pronouncement to the effect of over-ruling or refusing to follow-line *Hollington*'s case rules. It appears that the rule in *Hollington*'s case would have been applicable but for the legislative intervention that amended the law.

[16] Secondly, in respect of the Singapore decision in *Choo Michael*'s case, the learned High Court judge had referred to the judgment of Lord Diplock in *Hunter v Chief Constable of West Midlands and another* [1981] 3 All ER 727 and expressed the view that the *Hollington*'s case 'would have been expressly overruled by the House of Lords if it had not been abolished earlier by statute', and decided not to follow *Hollington*'s case. We note that the decision in *Choo Michael*'s case was in 1993. At that material time s 45 of the Singapore Evidence Act (Chapter 97) which

is in *pari materia* with our s 43 of the Evidence Act 1950 was, and still in force. The learned judge had not considered the effect of s 45 of the Singapore Evidence Act which is the statutory provision applicable then regarding the issue of relevancy and admissibility of previous criminal conviction or judgment in relation to a civil action. Instead, the learned judge had concentrated mainly on the common law position by looking at the English cases and cases from other common law jurisdictions such as United States and New Zealand. We also note that the effect of s 45 of the Singapore Evidence Act on the relevancy and admissibility of previous criminal conviction or judgment by or before a Singapore Court as evidence for the purpose of proving in any proceeding the fact that a person had committed the offence which is in issue was altered only in 2014 with the introduction of a new s 45A in the Singapore Evidence Act. In our view the Singapore decision in *Choo Michael*'s case is not an accurate precedent to follow. This is because we have s 43 which is a statutory provision that expressly provides for the relevancy or otherwise of previous criminal conviction or judgment in a subsequent civil action.

...

[19] No doubt judgment of court consists of opinion of the court as to the facts and evidence adduced before it. However, s 43 is very clear that judgment, order and decree is irrelevant unless they can be brought within the 'exception' under the section. In this respect, learned counsel for the plaintiff submitted if s 43 prohibits a judgment to be brought in as evidence, fortiori reasons or opinions which are orbiter (sic) in the judgment cannot also be brought in as evidence. We agree with this submission.

[20] Learned counsel for the first defendant in Appeal No 153 argued that the remark by the Federal Court in the 2004 case is not an orbiter (sic) but it is an opinion based on evidence. However, we must emphasise that the remark was based on inadmissible evidence. So technically and judicially speaking therefore, there is no evidence to support that remark. In the circumstances, it remains a personal opinion of the learned judge who had expressed it. Thus, such remarks as evidence of facts in another case would have little or no probative value.

[21] Our s 43 is in *pari materia* with s 43 of the Indian Evidence Act. Based on the Indian authorities cited to him, learned judicial commissioner concluded that the rationale for the enactment s 43 is that every case is to be treated as a class by itself; and the production of a previous judgment merely establishes the existence of a prior decision. There is no presumption that a prior judgment is the correct decision on the matter. What the law of *res judicata* establishes is that one cannot go behind the decision in certain similar factual cases based on the ground of public policy. The fact in issue in each case must be proved independently.

[22] The rational underlying s 43 can be gleaned from the statement in *Hollington*'s case which is as follows: 'The court which has to try the claim for damages knew nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to the court or what influence the court in arriving at its decision. Moreover, the issue in the criminal proceeding in not identical with that raised in claim for damages'. In other words, as said in the Indian case of *Gopalkrishna Gupthan v Annmalu Ammal* AIR 1972 KER 196 : '... it is the duty of the court to scrutinise the soundness or validity of opinion evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is

impossible because the court trying the subsequent case cannot reopen the case and hear it on the merits as if the court is hearing an appeal or is retrying the previous case on fresh evidence. The court in the subsequent case has to decide it on the materials before it exercising its own independent judgment ...'.

[23] In the face of overwhelming authorities locally and from foreign jurisdictions in particular UK (before the statutory intervention) and India that had been considered by the learned judicial commissioner that a judgment in a criminal case cannot be used as proof of a fact in issue in a civil case for claim for damages, we are inclined, as the learned judicial commissioner did, to agree with the above statement.

...

[27] It appears to us that the learned judicial commissioner is adopting different test when applying s 43 — one test for plea of justification and another for plea of qualified privilege and fair comments. In our view this is not a proper way to interpret and apply a statutory provision. There should be only one test; and that is whether the judgment relied on is relevant. We are of the view that once it is decided that under s 43 a judgment in another proceeding is not relevant to the civil proceeding at hand, then it is not relevant for all purposes unless it can be brought within the 'exception'. On this issue, with respect, we disagree with the learned judicial commissioner.

[28] The next issue which we would like to discuss is the submission by learned counsel for second defendant and third defendant that criminal judgment is relevant under ss 52 and 55 of the Evidence Act to show bad character of the plaintiff that would have impact on claim of damages. This is where the argument by the learned counsel as regard to the last limb of s 43 which says '... or is relevant under any other provision in this Act', is relevant. Learned judicial commissioner, after considering the pleadings, concluded that it is relevant under s 55 of the Evidence Act 1950 because the defendant is not seeking to rely on a single conviction to establish bad character but also seeking to rely on the pronouncement of the Federal Court as well as on the evidence of witnesses to be called at the trial.

[29] The argument by the learned counsel for the second defendant and third defendant raised the issue of interplay between s 52, s 53, s 54 and s 55 of the Evidence Act. However, s 53 and s 54 only apply to criminal proceedings. Therefore, it is not relevant in a civil proceeding. Thus, the learned counsel reliance on explanation 2 in s 54 is, in our view, misplaced.

[30] In civil proceedings, s 52 and s 55 are the relevant provisions. Under these two provisions, conviction for criminal offence is not relevant as evidence of bad character. Furthermore, the explanation to s 55 makes it very clear that only evidence of general reputation and general disposition is admissible to prove bad or good character. It cannot be proved by a particular act. In this regard, we think that the judicial commissioner had erred in concluding that the defendant is relying on general reputation and disposition. On the facts, we are of the view that the defendant by relying on the conviction of the plaintiff in the second sodomy case and the remark by the Federal Court as to the plaintiff's act of homosexual activities in the first sodomy case is in fact relying on particular acts to show general reputation and general disposition of the plaintiff. We do not think that this is correct and permissible by virtue of the explanation to s 55.

[44] It therefore appears clearly from the judgment of the Court of Appeal in the *Nallakaruppan* case that s 43 of the Evidence Act 1950 is the statutory codification of the common law rule in *Hollington*'s case. In the result the Court of Appeal concluded that the defendants in the appeals before them were precluded from relying on the plaintiff's criminal conviction for sodomy under s 377B of the Penal Code. The Court of Appeal also opined that the criminal conviction was also inadmissible under s 55 of the Evidence Act 1950 as only evidence of the plaintiff's general reputation was admissible.

[45] In the circumstance, in so far as the present application is concerned, following the doctrine of stare decisis, I take the view that I am bound by the decision of the Court of Appeal in this regard and it is my ruling therefore that *Hollington*'s case remains good law regardless of the views to the contrary by Lord Denning and others.

[46] Lord Denning's trenchant views on *Hollington*'s case, is not at all surprising because he was in fact counsel in *Hollington*'s case and had argued against the proposition or rule that was established by that case. In *Goody*'s case, he alludes to his unhappiness about *Hollington*'s case in pp 372–373, where he said:

> ... there is strange rule of law which says that a conviction is no evidence of guilt, not even prima facie evidence.
>
> That was decided in *Hollington v F Hewthorn & Co Ltd.* I argued that case myself and did my best to persuade the court that a conviction was evidence of guilt.
>
> *But they would not have it. I thought that the decision was wrong* at the time. *I still think that it was wrong. But in this court we are bound by it*. It means that when anyone publishes a story about a crime, he is in peril of being sued for libel. In the action he cannot rely on the conviction as proof of guilt. He has to prove it all over again, if he can.

[47] It should also be observed that in *Nallakaruppan*'s case the Court of Appeal had ruled that the defendants were also precluded from relying on a remark made by one member in a coram of three judges of the Federal Court in another criminal case involving the same plaintiff which is reported as *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405 at p 448; [2004] 3 CLJ 737 at p 788.

[48] In that case, the plaintiff (who was the accused/appellant), had been acquitted of the charge of sodomy but was found nevertheless to have been involved in some homosexual activities, albeit that it did not fall within the purview of the dates as mentioned in the charge against the plaintiff. The remark that was made reads as follows:

> To summarise our judgment, even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our decision must only be based on the evidence adduced and nothing else.

[49] In the present case the defendant is also relying on the same remark that was made by the judge of the Federal Court in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405 at p 448; [2004] 3 CLJ 737 at p 788. In so far as reference to this judicial remark is concerned, I note that the defendant had already made reference to this in the original defence (see para 8(i), (ii) and (iii) of the defence). Similarly, the defendant had also referred to another criminal case involving Dr Munawar Anees where he was charged and found guilty of taking part in homosexual acts with the present plaintiff (see para 9(iv) of the defence). There has been further amplification in paras 10A and 10B of the amended defence under the topic of partial justification.

[50] Following the *Nallakaruppan* case, all of these criminal cases would or should have been struck out by reason of s 43 of the Evidence Act 1950. However, I am not dealing with an application by the plaintiff to strike out these passages which were in the original defence. As such, my ruling herein in respect of encl 97, will not affect those parts of the original defence or the amended defence which I have just referred to.

[51] My own views on *Hollington*'s case may be stated as follows. First, I do not find it at all surprising that Lord Denning had described *Hollington*'s case as giving rise to a 'strange rule of law'. It is strange because the rule precludes evidence of the plaintiff's conviction after he had been found guilty of a crime which would necessarily have been proven beyond reasonable doubt. As such, since the criminal conviction had been subjected to a higher threshold of evidential burden, it is strange that a civil court hearing the same matter subsequently, should reject it. The theory behind the ruling that it is irrelevant and therefore inadmissible stems from the doctrine of 'res inter alios nocere non debet' which means the act or transaction between others does not prejudice a person who was not a party to it (see *Osborn's Concise Law Dictionary* (11th Ed)). Seemingly, that is the jurisprudential basis for rejecting evidence of a party's conviction.

[52] I may add that the jurisprudential rationale for rejecting criminal convictions is not only sound and reasonable but it is also fair. My analysis of the rule is as follows. So far we have only focused on the criminal convictions. It is relevant to ask, if the rule in *Hollington*'s case is to be discarded and convictions are to be admitted, then what is the consequence if a party had been acquitted in a criminal case? Does it follow that since he was acquitted, say of a charge of causing death by dangerous driving (s 41 of the Road Transport Act 1985), therefore the dependency claim in the civil court has to be dismissed by reason of the outcome in the criminal case?

[53] Quite obviously it would be unjust to dismiss the dependency claim as the dependants should not be deprived of their day in court to prove their claim for dependency on a balance of probabilities, albeit that the defendant had been acquitted in the criminal court for the road traffic offence. This is one of the reasons which impelled the English Court of Appeal to arrive at the rule which prohibits the introduction of criminal conviction in civil proceedings.

[54] Thus, if the rule in *Hollington*'s case is analysed in this way it is easy to appreciate that criminal proceedings and the civil actions are quite separate and independent of each other. They have a separate and independent existence and the parties having conduct of these proceedings are also separate and different. The public prosecutor proceeds with the criminal case in the public interest whereas the civil claim is almost always or mainly for monetary compensation and is driven and managed by the parties themselves. Also, the management of the cases and the burden and standard of proof in criminal and civil proceedings are totally different. But that does not mean that the deliberations in the criminal proceedings have absolutely no relevance at all in civil proceedings. That would indeed be too extreme a position to take. The relevance of the criminal proceedings may arise in a situation where the same witness in both proceedings gives inconsistent testimony in which case it would be legitimate to examine the notes of evidence in the criminal proceedings so that the witness may be confronted with his previous statement given to the criminal court with a view towards demolishing his credibility or to impeach the witness.

[55] Also, if an accused has unequivocally pleaded guilty to a criminal charge, then the plea of guilt may be admissible as an admission in the civil proceedings, provided that there is a nexus between the criminal charge and the civil proceedings (see *She Eng Gek v D A De Silva* [1957] 1 MLJ 55). And so, to take the *Hollington* example, if the accused had pleaded guilty to the charge of careless driving, it is unthinkable that that guilty plea would have been rejected by the civil court as evidence of admission of negligence.

[56] Hence in Malaysia, the common law rule in *Hollington*'s case which

renders any criminal conviction as inadmissible, survives by virtue of s 43 of the Evidence Act 1950 and following the opinion of the Court of Appeal in *Nallakaruppan*'s case, the fact of the plaintiff's conviction as per *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 AMR 185 is inadmissible and may not be pleaded by the defendant for purpose of the plea of justification or mitigation of damages.

[57] Following the decision of the Court of Appeal in *Nallakaruppan*'s case, evidence of the plaintiff's criminal conviction for the purposes of establishing the plaintiff's reputation or disposition cannot be admitted under s 55 of the Evidence Act 1950. First, specific convictions are barred and secondly, only evidence of general reputation or disposition may be admitted.

[58] Thus, all references to the plaintiff's alleged homosexuality as stated or opined or concluded or suggested in the several criminal cases referred to by the defendant in the proposed re-amended defence (*save for what has already been stated in the original defence and the amended defence*) are barred by virtue of s 43 of the Evidence Act 1950.

[59] Hence it follows that the Federal Court's decision on 10 February 2015 which is now reported as *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 AMR 185 cannot be relied upon to support the defendant's plea of justification. I am mindful that in a number of previous civil cases involving the present plaintiff, the courts have relied upon the plaintiff's conviction. However, it is obvious that in all of the cases, s 43 of the Evidence Act 1950 and the common law rule in *Hollington v F Hewthorn & Company Limited* were not ventilated or discussed or ruled upon by those courts.

[60] In my view, all the other cases which have hitherto held the view that the present plaintiff's criminal convictions are admissible in civil proceedings without considering the rule in *Hollington v F Hewthorn & Company Limited* and/or s 43 of the Evidence Act 1950 are necessarily decisions which are per incuriam.

[61] In any event, it is apparent that the current judicial thinking or approach to the topic of admissibility of criminal convictions in civil proceedings is to be found in the unanimous decision of the Court of Appeal in *Dato Nallakaruppan*'s case which is plainly binding on this court. Whether this judicial thinking or opinion is fossilised or undergoes a radical change in due course by reason of any future ruling by the Federal Court remains to be seen. For now, the Court of Appeal's decision in *Nallakaruppan*'s case prevails.

DO THE IMPUGNED WORDS CONVEY A LESSER MEANING

[62] In this case, the defendant has robustly responded to the meanings that the plaintiff says that the impugned words are capable of bearing. According to the plaintiff, the impugned words in their ordinary and natural meaning or innuendo meaning are suggestive of homosexuality. According to the defendant, this is an 'extreme meaning'. At any rate, the defendant has responded to that meaning and raised the defence of justification and qualified privilege in answer to the 'extreme meaning'. However, in the alternative, the defendant also maintains that the impugned words have a lesser meaning and he intends to justify the lesser meaning. According to the defendant, the reasonable reader is one who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

[63] The question is — what are the lesser meanings (if any) which the impugned words are capable of bearing? In this regard, we may examine the following cases which provide useful guidance as to the approach to be taken when dealing with the meaning of words. The starting point is that the meaning that the words are capable of bearing are not necessarily the meaning that the plaintiff says it has but the meaning which the words are capable of bearing.

[64] In *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 3 SLR 337 the Singapore High Court said:

> the lesser meaning which the defendant intends to plead is primarily the scope of the defence of justification does not depend on the way the plaintiff pleaded the case but on the meanings which the words published were capable of bearing.

[65] In *Bonnick v Morris* [2002] UKPC 31 (PC), Lord Nicholls said that words take their colour from that context and that there is room for different readers to have different views on the meaning. He said:

> 20. This divergence of view (as to whether the article contained the defamatory implication there in question) is neither surprising nor unusual. Language is inherently imprecise. Words and phrases and sentences take their colour from their context. The context often permits a range of meanings, varying from the obvious to the implausible. Different readers may well form different views on the meaning to be given to the language under consideration.

[66] The English case of *Galloway v Telegraph Group Ltd* [2004] EWHC 2786 (QB) has a useful passage on 'meaning of words' which is very relevant to the issue at hand. It reads as follows:

THE MEANING OF THE WORDS

[47] Even though the single meaning doctrine has no application in the context of qualified privilege, my first task is nonetheless to rule on the issue of the natural and ordinary meanings which the articles would have conveyed to reasonable and fair-minded readers. The test to be applied is well established. Evidence is not admissible on the issue of natural and ordinary meaning. It is essentially a matter of impression. The court should give the articles the natural and ordinary meaning(s) which they would have conveyed to the ordinary reasonable reader, reading them once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. I should have regard to the impression the relevant words have made upon me, in considering what impact it would have made on the hypothetical reasonable reader. The court should certainly not take too literal an approach to its task.

[48] Context is always important. In order to determine the natural meaning of the words of which a claimant complains, it is necessary to take into account the context in which they were used and the mode of publication. Thus a claimant cannot seek to isolate a passage in an article, and complain of that alone, if other parts tends to throw a different light on that passage: see eg per Lord Bridge in *Charleston v News Group Newspapers* [1995] 2 AC 65; [1995] 2 All ER 313.

[49] Context is perhaps especially important in this case, where the claimant is complaining of parts of newspaper articles spread over two days and consisting of a total of thirteen pages. The context would thus include other parts of the coverage of which no complaint is made. In particular, it is necessary to take account of the content of the Baghdad documents (set out above) which were reproduced in the newspaper for readers to consider.

[50] Furthermore, when judging the meaning of the 23 April articles, it is necessary to bear in mind that many readers will have had a general impression of their reading from the day before. It is legitimate to take that into account when assessing the meaning of the second day's coverage. The reverse is not the case, since it is not permitted when attributing a meaning or meanings to a published article to refer to subsequent material.

[67] The defendant's burden of giving a meaning which is different from that which has been given by the plaintiff and the burden of providing particulars was explained in *Chase v Newsgroup Newspapers Ltd* [2002] EWCA Civ 1772 as follows:

> The burden of proving justification rests on the defendant. Although the standard of proof is the balance of probabilities, the more improbable an allegation he stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence will be established.
>
> ...
>
> Under modern libel practice a defendant must set out in his/her statement of case the defamatory meaning he/she seeks to prove to be essentially or substantially true. This is now known as the Lucas Box meaning, following the leading case of *Lucas Box v New Group Ltd* [1986] 1 WLR 147. By this means the claimant (and the court) will know unequivocally what the defendant is seeking to justify. In the Lucas-Box case itself Ackner LJ said at p 153G that *if the particulars originally given by a defendant of a Lucas-Box meaning are not clear then the situation must be made unequivocal. The defendant must then give proper particulars of the facts on which he/she relies to justify that meaning* (see *McPhilemy v Times Newspaper Ltd* [1999] EMLR 751 at p 770).
>
> The adoption of this procedure means that at the trial the jury must undertake a two-stage process. They must first decide whether on the admissible evidence called by the parties the defendant has proved to their satisfaction, according to the appropriate standard of proof, all or at least some of the factual propositions asserted by the particulars of justification. They must then decide whether the whole of the facts which they have found to be proved are such as to establish the essential or substantial truth of the 'sting of the libel'.

[68] In *Cruise v Express Newspapers PLC* [1999] QB 931, the court emphasised that the meaning of the words must be taken from the context of the articles or words spoken as a whole:

> A defendant in defamation proceedings was tied to his pleadings, and the plaintiff could apply to have a plea of justification or fair comment struck out if he contended that it was not properly arguable that the words complained of were capable of bearing the meaning or meanings on which the defendant relied, or that the meaning or meanings relied on were not defamatory, or that a particular meaning, although defamatory, conveyed a sting about which he made no complaint separate and distinct from that on which he relied; that if words containing a particular sting of which the plaintiff complained were inextricably mixed up with words containing a separate and distinct sting of which he did not complain, the defendant was not entitled to adduce evidence in justification of the latter sting, nor was the plaintiff required to attempt to sever words of which no complaint was made, since the whole of the text would be before the jury so that they could see the context in which the words complained of were published; that the rules of pleading practice were not so artificial as to prevent a plaintiff from relying on the rules relating to separate and distinct stings simply because all the words in an article were set out in the statement of claim; and that, accordingly, the judge had been correct not to allow the defendants to justify or plead fair comment in respect of a quite separate and distinct sting of which the plaintiffs made no complaint.

[69] In defamation proceedings, a defendant who seeks to give the impugned words a lesser meaning or less extreme meaning has the burden of not just stating clearly what those lesser meanings are, but has to also provide the proper particulars of facts on which he relies to justify that meaning.

[70] In *Lee Kuan Yew v Devan Nair* [1990] 3 MLJ 452 the court opined that the particulars must be relevant or connected to the meanings that are relied upon. The court said:

> It clearly follows that the issue on the pleadings is whether the alleged defamatory words are capable of having the meaning which the defendant contends. That alleged meaning relates essentially to the plaintiff's conduct in cultivating the goodwill and support for the PAP and the aim of a 'Malaysian Malaysia' from Britain, Australia and New Zealand and the alleged fact that in 1965 the Malaysian authorities seriously considered detaining the plaintiff.
>
> It can be seen that this *alleged meaning is totally unrelated to the averment in particulars* (viii) that the plaintiff gave 'approval' for the detention of dissidents to extract statutory declarations through psychological pressures. It follows, in my judgment, *that particulars (viii) is irrelevant to the issues on the pleadings and must be struck out*.

[71] In *Mirzan bin Mahathir v Star Papyrus Sdn Bhd* [2000] 6 MLJ 29 the court held that the particulars that are provided must support the meaning that the defendant ascribes to the impugned words. In that case, the court said:

> (1) It is trite that the defendant must not put in a plea of justification lightly or without carefully considering the available evidence before him and as to such evidence as would be likely to be available to him. A defendant setting up a plea of justification must plead his case with sufficient particularity, without circumlocution or obfuscation, so as to enable the plaintiff to know the possible defamatory meaning of the words complained of, which the defendant is seeking to justify.
>
> When a defendant by its Lucas-Box meaning or in reliance of its particulars of justification, makes a serious allegation of dishonesty or other improper conduct, even suggestive of acts of corruption, the obligations become even more compulsory and obligatory upon the defendant. The *particulars pleaded must support the defendant's Lucas-Box meaning so that if any particulars fall outside the ambit of the Lucas-Box meaning, such particulars ought to be struck out and/or if the Lucas-Box meaning makes any allegation which is unsupported by the particulars, that part of the Lucas-Box meaning should equally be struck out*.

[72] Having regard to the principles that may be gathered from the authorities referred to above, the defendant therefore maintains that a lesser defamatory meaning may be culled from the impugned words. In this regard, the defendant says that the lesser meaning that can be ascribed to the impugned words is that the plaintiff is capable of 'playing out' or 'betraying' his political partners. As such, the defendant maintains that he is entitled to put forward a

lesser meaning which he says is in accordance with the meanings which the impugned words are capable of bearing. It was submitted for the defendant that the lesser meaning are benign and not defamatory. However, I take the view, that in so far as the defendant's lesser meanings are concerned, (para 8(1), (2) and (3) of the proposed re-amended defence), it is clear that these are not benign words and are in themselves defamatory of the plaintiff.

[73] The focus for purpose of the lesser meaning is on the word 'betrayal'. The dictionary meaning of betrayal is: 'to hurt somebody who trusts you, especially by not being loyal or faithful to them' — *Oxford Learner's Dictionary* or 'deliberately doing something to harm those who need your support or helps their opponents' — *MacMillan English Dictionary*. Quite obviously the proposed lesser meaning is in itself stinging and inherently harmful to the reputation of a politician, more so the plaintiff who is the advisor to PKR.

[74] In any case, the defendant maintains that he can prove justification for the lesser meaning. To that end the defendant has set up eight paragraphs in the proposed re-amended defence which he says contain particulars in support of the lesser meaning. Before I deal with the particulars in support of the lesser meaning, it is necessary to first determine whether the impugned words are capable of having the lesser meaning as ascribed by the defendant by way of the proposed re-amended defence.

[75] Here again, parties are in conflict. The defendant maintains that it is only logical and reasonable that the impugned words will be understood as having the lesser meaning whereas the plaintiff states that the impugned words are not capable of having the lesser meaning.

[76] As I said earlier, it was submitted for the defendant that the impugned words are capable of having the meaning that the plaintiff is capable of playing out or betraying his political partners and that it defies logic and common sense for the impugned words in its ordinary and natural meaning to be construed as 'sodomising PAS and/or DAP' which are both political parties. Hence, it was submitted that logic, common sense and reason dictates that the impugned words suggest or imply that the plaintiff is capable of and will play out or betray his political partners.

[77] In this regard, I have undertaken an examination of all words that were used during the political speech and construed them as a whole and not just looked at the impugned words in isolation as context is key to determining the meaning of the words used in any particular situation for purposes of an action in defamation.

[78] Counsel for the plaintiff submitted that, first, the impugned words are not capable of having the lesser meaning as ascribed by the defendant. Next, it was submitted that even if it were capable of bearing such a meaning, it must necessarily refer to only PAS and DAP. It cannot under any circumstances be understood to extend to include BN or UMNO, which have not been named, nor make a generalised reference to 'political partners' and 'political opponents'. There is no mention whatsoever in the words spoken by the defendant of other persons or parties.

[79] In amplification of her submissions that the impugned words do not carry the lesser meaning, counsel for the plaintiff also submitted that the proposed particulars in para 8(i)–(viii) of the proposed re-amended defence do not refer to DAP and PAS nor are they facts that support the truth of the defendant's meaning that the plaintiff betrayed or played out PAS and DAP. In opposing the amendments, the following points were emphasised by counsel:

(a) the reference to Pakatan Rakyat is wholly misconceived as Pakatan Rakyat was only formed after the March 2008 general elections;

(b) by pleading a 'lesser meaning', the defendant is in fact acknowledging that the impugned words are defamatory; and

(c) as the years progress, the defendant attempts to put new, different and inconsistent meanings to something he said seven years ago. In his earlier amendment application, his explanation what the words allegedly meant was something completely different.

MY VIEW — LESSER MEANING

[80] Having looked at all the words uttered during the political speech that was allegedly made by the defendant on 20 February 2008, I am inclined to agree with the submissions made by learned counsel for the defendant that the more severe imputation of homosexuality does not preclude the lesser meaning which has been ascribed to the impugned words as per para 8(1), (2) and (3) of the proposed re-amended defence. Here it is relevant to keep in mind that the occasion was a political campaign and in the Malaysian context the object of any political speech/campaign would be to show the opponent or the opposing party in bad light and to debunk him/her or the party as a suitable candidate or party as the case may be.

[81] The impugned words are, 'DAP main PAS dari kanan, PAS main DAP dari kiri, Anwar main dua-dua dari belakang' and it is my view that these words, when viewed in context of the speech that was made and when set against the backdrop of the occasion when it was made (during a hotly contested political campaign), can also mean or imply that the plaintiff has a tendency to 'betray or play out his political partners or allies'.

[82] Having read the whole of the speech that was given by the defendant, it is my view that the political speech as a whole, suggests that the defendant was, first, belittling the tie-up between the opposition parties prior to the elections as somewhat of a 'marriage of convenience' only to disintegrate after the elections are over.

[83] Second, the impugned words suggest that the plaintiff was someone who could not be trusted and is likely to play out or betray his political bed-fellows. When seen in that context, it is not altogether far-fetched to suggest that the impugned words was to do harm to the plaintiff in terms of his integrity and trustworthiness vis a vis his political partners, namely PAS and DAP.

[84] I therefore accept that the impugned words also have a lesser meaning. But I hold that the words *betrayal or playing out is or must necessarily be confined to the two opposition parties ie*, PAS or DAP. It does not refer to other persons or parties. This is significant when the particulars in support of the lesser meaning are examined.

[85] The defendant maintains that the lesser meaning is innocuous and is harmless. I do not think so. The lesser meaning is itself inherently injurious to the plaintiff's reputation as a politician and as the political adviser to PKR. In my view, the suggestion that the plaintiff has the tendency to betray or play out his political parties or allies can be as damaging if not more damaging than the suggestion that he is allegedly a homosexual. But that's a different matter altogether. What is important and imperative is that the defendant maintains that the lesser meaning can be justified. To that end he has supplied particulars, which he says justify the lesser meaning.

[86] As such, I am presently inclined to accept that there is room for such an interpretation of the impugned words and would hold that prima facie, they are capable of being construed as suggesting that the plaintiff is capable of playing out or betraying his political partners. That is the first handle in this process. I am of the view that there is scope for a lesser meaning as suggested in para 8(1), (2) and (3) of the proposed re-amended defence.

[87] The next question which is no less important, is whether the particulars that have been provided in para 8(i)–(viii) of the proposed re-amended defence support the lesser meaning. The particulars which he seeks to rely on are contained in para 8(i)–(viii) of the proposed re-amended defence pertaining to the lesser meaning. In this regard, I find that the particulars have the following attributes and suffer from the following infirmities. For convenience, I shall first summarise them and thereafter render my detailed analysis:

(a) they refer to parties or individuals other than PAS and DAP;

(b) they refer to events which happened subsequent to the publication of the impugned words; and

(c) they refer to events or conduct of the plaintiff in aspects which are not germane to or connected to the lesser meaning.

[88] The detailed analysis of these infirmities in the particulars for the proposed lesser meaning are more fully discussed hereinbelow.

Whether the particulars are admissible, relevant and connected to the proposed lesser meaning?

[89] As I said earlier, the defendant relies on eight paragraphs in his proposed re-amended defence in support of the lesser meaning. Counsel for the plaintiff has meticulously referred to each of the paragraphs and submitted that these are not facts and in any event do not qualify as particulars and significantly that there is no causal connection between the matters stated in the paragraphs and the proposed lesser meaning. In many respects, the particulars make references to post-publication events, which counsel for the plaintiff says is inadmissible for purposes of justification.

[90] In paras 8(i)–(ii) of the proposed re-amended defence, the defendant alludes to the fact that one Datuk S Nallakaruppan who was once a member of PKR, was deceived and played out by the plaintiff. The said Datuk S Nallakaruppan was neither a member of PAS or DAP. As was rightly submitted by the counsel for the plaintiff, this does not relate to the lesser meaning, which alludes to the plaintiff playing out or betraying PAS or DAP. Hence, this paragraph has no causal connection with the lesser meaning and does not support it.

[91] In para 8(iii), the defendant has referred to the plaintiff's role in the formation of the Hindu Rights Action Force ('HINDRAF') and that he had used HINDRAF for his own purposes and later discarded it by labeling it as racist. Again, HINDRAF has nothing to do with PAS or DAP and the alleged use or misuse of HINDRAF by the plaintiff would be a stretch in interpretation to suggest that such conduct on the plaintiff's part even if true, constitutes betrayal or playing out of PAS or DAP. The plaintiff may have had a falling out or he may have even used HINDRAF for his own purposes. Whilst that may be a betrayal or playing out of HINDRAF, it is imperative to keep in mind that HINDRAF is not DAP or PAS and as such, the plaintiff's conduct vis a vis HINDRAF has nothing to do with the proposed lesser meaning. As such, this set of particulars have no causal connection with the proposed lesser meaning and do not support the lesser meaning.

[92] Next we may examine para 8(iv) of the proposed re-amended defence. It alludes to the plaintiff's conduct in scheming with local political powers and foreign powers to topple Tun Dr Mahathir Mohamed (the former Prime Minister) and usurp the position as Prime Minister of Malaysia. Again, this too has no relevance to the lesser meaning as it has nothing to do with the plaintiff's conduct vis a vis PAS and DAP.

[93] The next topic in support of the lesser meaning is contained in para 8(v) of the proposed re-amended defence and this relates to the alleged change in political power which was predicated or declared to take place on 16 September 2008. Here it is alleged that the plaintiff had 'misled' his Pakatan Rakyat coalition as to the strength of support which he could garner in order to bring about a change in government.

[94] The point here is that this charge even if proven, does not at all resonate with the proposed lesser meaning. As such, it is irrelevant to the lesser meaning. What needs to be emphasised is that the plaintiff's conduct of misleading his political partners or allies (even if true) cannot be equated with betrayal of or playing out his political allies.

[95] I make two observations in this regard. First, the facts relating to this set of particulars had allegedly occurred in 2013 whereas the impugned words were uttered on 20 February 2008. Hence, it seems that the defendant is relying on subsequent events to justify what he meant by the words that were uttered presciently five years earlier. I have in another part of this judgment, dealt with the issue of reliance on subsequent events in a defence of justification. The conclusion that I have reached in this regard is that reliance on subsequent events is not entirely prohibited but the scope for such reliance is indeed narrow and must necessarily depend on the circumstance of the case.

[96] Hence, the question as to whether a subsequent event can be relied upon would depend on the nature and meaning of the words used and the causal connection and temporal proximity between the publication of the impugned words and the subsequent event. Here, there is no such nexus between the impugned words and the lesser meaning relating to the event of 16 September 2013.

[97] In any event, the event relating to 16 September 2013 only demonstrates that the plaintiff can only be guilty of having a lofty, grandiose or even misguided or uninformed or misinformed idea or notion that he had the requisite members to form the new government.

[98] At the other extreme, it may well be a case of the plaintiff merely engaging in political puffing when he really did not have the numbers.

Whatever may be the case, ultimately such conduct has to be seen for what it is. If the plaintiff thought that he had or was hoping that he had the numbers then it may be political naivete on his part. Even if he was not candid about the numbers that he had, I am not convinced that such conduct can be equated to betrayal or playing out PAS or DAP. Betrayal or playing out is different from giving false hope to his political allies.

[99] The next item is para 8(iv) of the proposed re-amended defence. This deals with the plaintiff's allegation of phantom voters at the 2013 general elections. According to the defendant, this was a spurious allegation and turned out to be a false claim. Quite obviously, the defendant is relying on matters that occurred some five years after the publication of the impugned words. It is alleged that the plaintiff was not truthful to his political allies about the phantom voters.

[100] In my view, the plaintiff's spurious or false complaint of phantom voters has no relevance to the lesser meaning of playing out or betraying PAS or DAP. As such, this too is irrelevant to the purposes of the lesser meaning. Also, quite apart from this matter being a subsequent event, there is obviously no causal link between the lesser meaning and the charge that is being made against the plaintiff, in terms of the allegation of 'phantom voters'.

[101] The next complaint that the defendant makes of the plaintiff's conduct is that the plaintiff had reneged on a peace deal which he had brokered with the leader of BN to respect the outcome of the 2013 general elections (see para 8(vii) of the proposed re-amended defence). Again, this is an event which allegedly took place five years after the publication of the impugned words and in any event, has no causal link or relevance whatsoever to the impugned words or the lesser meaning.

[102] The final aspect of the facts which the defendant seeks to rely on in support of his plea of justification for the lesser meaning is the 'Kajang Move' (see para 8(viii) of the proposed re-amended defence). Again, the 'Kajang Move' is an event which took place well after the publication of the impugned words.

[103] In my view, the so-called Kajang Move and the controversy, chaos and criticism surrounding it and the potential crisis in the state of Selangor that was unleashed have no causal link to the impugned words and is not relevant to proposed lesser meaning. The Kajang Move may well be demonstrative of the plaintiff's selfishness or other attribute or motive and may well be criticised and deprecated for a variety of reasons, but it most definitely has nothing to do with betrayal or playing out of PAS or DAP.

[104] Hence, in so far as the particulars in support of the proposed lesser meaning are concerned, for the reasons discussed above, I am inclined to agree with the submissions that were made by counsel for the plaintiff, that the particulars are not facts that support the sting of the libel nor the truth of the impugned words in the context of the so-called lesser meaning. In the result, for the reasons as discussed above, I am impelled to the view that, the amendments in relation to the proposed lesser meaning are irrelevant and improper and ought to be rejected. In the upshot, it is my conclusion that the proposed particulars, even if true, bear no relation to the lesser meaning and cannot be relied upon to prove that the plaintiff has betrayed or played out or will or has the tendency to betray or play out his political partners or allies, namely PAS and DAP.

ADMISSIBILITY OF EVIDENCE OF SUBSEQUENT (POST-PUBLICATION) EVENTS

[105] In *Gatley's* (12th Ed) — para 11.10, the learned authors opinion on the relevance of evidence of events subsequent to publication is as follows:

> Evidence subsequent to publication.
>
> What evidence can be adduced before the court is dependent on the nature of the imputation that has been published? Most commonly, perhaps, a general charge against character may be justified by subsequent events, so that 'if a libel accuses a man of being a 'scoundrel', the particulars of justification can include facts which show him to be scoundrel, whether they occurred before or after the publication'. But even where the charge is specific, it is submitted that evidence of matters arising after the date of publication may be admissible to justify it, as for example evidence of similar facts. In other circumstances, an imputation may be proved only by reference to the facts as they were at the time when it was published.

[106] In *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407 the court discussed the question of admissibility of subsequent events in the following passage:

> Counsel for the defendants sought to support those particulars. He says that on *a plea of justification the pleader can rely on facts which happened subsequently*; and that a similar rule should apply to a plea of fair comment. He drew our attention to *Maisel v Financial Times Ltd* and *Godman v Times Publishing Co Ltd. Those cases show that, in order to prove that the words are true, particulars can be given of subsequent facts which go to support the charge*. Thus, if a libel accuses a man of being a 'scoundrel', the particulars of justification can include facts which show him to be a scoundrel, whether they occurred before or after the publication. Such particulars are admissible because they enable him to know the case he has to meet and open the way to discovery.
>
> The judge thought that those cases had no application to a plea of fair comment. I agree with him. *In order to makes good a plea of fair comment, it must be a comment on facts existing at the time. No man can comment on facts which may happen in the future*. There is a passage in *Gatley On Libel and Slander* (6th Ed) para 724, which

goes further. It states:

> The facts which the defendant seeks to prove as the basis of his comment must have been known to him when he made the comment.

I do not know that I would go quite so far as that. A man may comment on existing facts without having them all in the forefront of his mind at the time. Nevertheless it must be a comment on existing facts. I think that the matters stated in those particulars may well be admissible in evidence at the trial, but that does not mean that they should be pleaded. It is a settled rule of pleading that evidence is not be pleaded. RSC O 18, r 7(1) provides:

> ... every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved ...

[107] However, in *Bennet v Newsgroup Newspapers Ltd* [2002] EMLR 39 at p 10 para (i), the Court of Appeal considered the case of *Cohen v Daily Telegraph* and ruled that the case does not establish a principle of general application and there is no universal rule that subsequent events are permissible in all cases where justification is raised by a defendant. This is made clear from the following passage:

> (i) *the passage in the judgment of Lord Denning MR. In Cohen v Daily Telegraph* [1968] 1 WLR 916 *at p 919 on which Mr Price relied does not go further that to note that it may be proper to include post-publication facts in particulars of justification. Whether it is proper must depend on the facts of the particular case*. Lord Denning's example of a man being defamed as a 'scoundrel' echoes what Lord Cozens-Hardy MR said in *Maisel v Financial Times* [1915] 3 KB 336 at pp 339–340, about 'general character and general tendency'. The judge dealt with this point very briefly and seems not to have asked himself whether in the circumstances of this case justification of the defendant's pleaded meanings-including the new sub-paras (4) and (5), make it necessary for us to review the judge's exercise of his discretion. *In our judgment it cannot be right, in relation to 'sufficient grounds' in sub-para (2), to allow particulars of events since the date of publication. The sufficiency of the grounds must be assessed on material available at that date*.

[108] It is fair to conclude that for justification there appears to be only a narrow scope for a defendant to rely on subsequent events but there must necessarily be a causal connection between the impugned words and the occurrence of the subsequent event so as to make it connected and relevant. The case of *Maisel v Financial Times Ltd* [1914–15] All ER Rep 671 at pp 674–657 is an example of the court allowing a subsequent event to be admitted in aid of a plea of justification. But the case also demonstrates that it is not usual to allow a defendant to rely on subsequent events as the defendant should generally rely on the materials as they existed on the date of the publications. In that case the court said:

...

But in substance it is *whether it is admissible in an action of libel, where there is a plea of justification, to give, in support of that plea, particulars alleging acts which occurred after the libel. It seems to me that, to that proposition, there can be given no direct answer, Yes or No; I think it must depend on the nature of the libel and it must also depend on the nature of the acts*.

The nature of the libel here has been defined by the innuendo. When I say 'the nature of the libel,' I do not say that a jury would necessarily say that it means that; but that is what the plaintiff alleges that it means according to the final amendment of the defence. *The defendants say that, if the said words mean that the plaintiff was of a character and reputation such that he was likely to have misappropriated the funds of the company with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia, Ltd, if he had the opportunity*,

...

The innuendo was that it meant that his character and reputation were such that he was likely to have misappropriated the funds of the company with which he was connected, and that he would have misappropriated the funds of the Oil Trust of Galicia, Ltd, if he had had the opportunity. Therefore, *the particulars of the defence as finally settled follow exactly the innuendo of the plaintiff. That alleges that this libel has three meanings, as I read it: that he was of a character and reputation such that he was likely to have misappropriated; that he would have misappropriated if he had the opportunity*, and that he was an unfit person to be a director — the third one I have left out. That being the meaning as alleged and the defence of justification which is set up, it seems to me that it is impossible to exclude, by one general preposition, particulars of any acts that took place after the libel.

The allegation is that he was of a character to misappropriate funds, and that he would misappropriate funds if he got the chance. *It seems to me that it cannot be irrelevant to show that, very shortly after the libel, as soon as he did get the chance, he did misappropriate*.

...

I wish to guard myself against being supposed to say that, if you want to prove a libel on a man alleging something at a particular date, you may always go and prove anything that happened afterwards in order to show that he was likely to have done it. I do not think such a proposition can be maintained for a moment. But where, as here, the allegation is that he is a person of a character likely to do a certain act and that he would do the certain act if he got the opportunity, then it seems to me that it cannot be said to be irrelevant to prove that, as soon as ever be got the opportunity, a short time after the libel, he did it. It may be that the act which he did was so long after the libel that it would have no relevance at all having regard to the time of the libel. If that were so, it would not be admissible.

[109] As such, in so far as reliance on subsequent events is concerned, the general rule is that for the defence of justification, the facts relied upon must precede or exist as at the date of publication of the impugned words. As such the startling point is that subsequent events may not be relied upon. However,

in certain narrow and limited circumstances, evidence of subsequent events may be allowed for purposes of the plea of justification, but this will depend very much on the facts. Most certainly there must some degree of consanguinity and proximity of time between the impugned events and the subsequent events.

[110] In the present case, the subsequent events are, inter alia, the Federal Court conviction, the event which has been described as the Kajang Move and the forming of a new government on 16 September 2013, which are all not within the scope of the exception of the general rule as to admissibility of subsequent events to support a plea of justification. In *Maisel*'s case, the impugned words suggested that the plaintiff would misappropriate if he had the opportunity. Shortly after the publication of the impugned words the plaintiff was in fact involved in an act of misappropriation.

[111] Thus, the defendant's impugned words in *Maisel*'s case were prescient and turned out to be true. That is not the case here. Although homosexuality is inherent and obvious from the Federal Court conviction, the impugned words that were allegedly uttered by the defendant do not have the type of prescient quality so as to bring it within the exception. It is a matter of pure coincidence that post-publication events have crystallised to a point where about seven years later the defendant conveniently seeks to rely on a conviction which is, as I said, purely fortuitous for the defendant.

[112] Also, in this regard, there must be close proximity of time between the publication of the impugned words and the subsequent events. On this score, I find that, quite apart from the hurdles posed by way of s 43 of the Evidence Act 1950, the subsequent event, ie the Federal Court conviction occurred long after the publication of the impugned words. For the reasons as stated above, the plaintiff's conviction under s 377B of the Penal Code (the Federal Court conviction) and the other post-publication events cannot be relied upon for purposes of justification whether in respect of the extreme meaning or the lesser meaning.

SUBSEQUENT EVENTS — QUALIFIED PRIVILEGE

[113] Thus far we have discussed the question of admissibility of subsequent events for purposes of justification. The next question is whether subsequent events are admissible for purposes of qualified privilege. In so far as qualified privilege is concerned, it is clear that the rule is that subsequent events cannot be relied on for a plea of qualified privilege. There is no exception.

[114] In *Loutchansky v Times Newspaper Ltd* [2002] QB 321 the court of first instance declined to give permission to the defendants subsequently to amend

their defence to add matters which were not known to them at the time of publication:

> On appeal by the defendants —
>
> Held, dismissing the appeal, that a publication of an untrue defamatory statement was only protected by the defence of qualified privilege where the defendant was under a duty, legal or moral, to publish it to a person or persons having a corresponding interest in receiving it; that that duty had to exist at the time of publication and the defendant must have had an adequate knowledge of the facts that gave rise to it; that, in deciding whether an occasion of publication attracted qualified privilege, the court was required to consider objectively in the light of the matters known to the publisher at the time of publication all the circumstance surrounding the publication when it considered whether the publisher had a duty to publish the information in question on that particular occasion; that the public had no right to know untrue defamatory matter about which the publisher had made no sufficient inquiry before deciding on publication.

[115] The principle is also illustrated in the case of *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 1 WLR 2571 where the court held that for qualified privilege and malice the defendant's *state of the mind was to be determined as at the time of the publication and not by reference to subsequent investigations or events*.

[116] In the upshot, it is impermissible for the defendant to rely upon any subsequent event for purposes of qualified privilege. Thus, the defence of qualified privilege stands or falls on the materials as they existed as at the date of the publication of the impugned words.

THE PLAINTIFF'S REPUTATION — WHETHER CRIMINAL CONVICTIONS AND SUBSEQUENT EVENTS ARE RELEVANT

[117] A defendant who seeks to rely on a plaintiff's bad reputation for purposes of mitigation of damages is confined to the evidence of his bad character as it existed as at the date of publication and not on subsequent bad character. In *Gatley*'s — para 35.34, the learned author opines as follows:

> The evidence must be confined to general bad character of the claimant prior to or at the time of the publication of the libel. Evidence of bad character subsequent to that time is not admissible in mitigation of damages ...

[118] The next point is that the reputation of a person is dependent on how he is held in the estimation of the public and what is *generally* believed about his character. The plaintiff's reputation is to be determined by reference to his character in general and specific matters such as convictions are inadmissible.

[119] In *Scott v Sampson* [1881–5] All ER Rep 628 the court held that

particular acts of the plaintiff's misconduct are not admissible to show that the plaintiff has a bad reputation in an action for libel, for the purpose of reducing the damages. Hence, the rule is that evidence of rumours circulating before the publication of the libel that the plaintiff had done what was charged in the libel, and evidence of particular acts of misconduct on the part of the plaintiff tending to show his character and disposition, is not admissible, but evidence of general bad character is admissible as being material in mitigation of damages.

[120] This was reiterated in *Plato Films Ltd and Others v Speidel* [1961] 1 All ER 876 where the court held that in an action for defamation, evidence of the plaintiff's bad reputation in a sector of life relevant to the alleged libel was admissible in mitigation of damages, but evidence of specific instances of misconduct or tending to show what character the plaintiff ought to have in the public estimation (as distinct from what he did have) was inadmissible in mitigation of damages. Thus, in the present case, at common law, the defendant would be precluded from relying on subsequent events or specific matters such as criminal convictions to show the plaintiff's alleged bad character.

[121] This common law prohibition is yet another hurdle that the defendant did not succeed in crossing, over and above the hurdles that were posed by ss 43 and 55 of the Evidence Act 1950. I may add that the defendant's reliance on the plaintiff's conviction in criminal cases for purposes of mitigation of damages was also discussed by the Court of Appeal in *Nallakaruppan*'s case and it was held in that case that under s 55 of the Evidence Act 1950, a defendant is not entitled to refer to specific convictions as a means of showing general reputation and disposition. In the result, the defendant may not plead matters relating to the plaintiff's criminal conviction, inter alia, the Federal Court conviction.

LIBEL PROOF — THE PLAINTIFF

[122] The last topic for discussion in this judgment is a novel point that was raised by the defendant. By the proposed amended defence, the defendant intends to rely on facts in order to support a theory that the plaintiff is 'libel proof'. The jurisprudence for this has been taken from an article in the *Harvard Law Review*, where the concept of libel proof plaintiff is discussed:

> Libel Proof
>
> Courts are increasingly facing the problem of *libel plaintiffs who challenge published statements that do not in fact damage their already sullied reputations. These cases have given rise to the so-called 'libel-proof plaintiff doctrine*'. Which bars relief to such plaintiffs as a matter of law. As applied over the past ten years, the broad doctrine first enunciated has been articulated in two narrow contexts. *Libel claims pursued in*

the issue-specific context present the question whether previous publicity or criminal convictions have so tarnished the plaintiff's reputation that he should be barred, as a matter of law from receiving a damage award.

The incremental libel — proof doctrine by contrast, bars libel awards when an article or broadcast contains highly, damaging statements, but the Plaintiff challenge only a minor assertion in the communication as false and defamatory. According to this branch of the doctrine, the severe effect of the highly damaging statements renders inconsequential any effect of the minor assertion, even if false, and thus should serve to bar the entire libel action as a matter of law.

[123] In this regard, the defendant maintains that the plaintiff's reputation in the Malaysian community was so tarnished and sullied before the publication of the impugned words that no further reputational harm can take place against the plaintiff. It is alleged that the plaintiff was in effect, 'libel-proof' before the publication of the impugned words. The proposed amendments in this regard are found at paras 2A of the proposed re-amended defence.

[124] The premise on which the defendant seeks to assert that the plaintiff is 'libel-proof' is that he has had a series of convictions over the years such that his reputation has become so sullied and consequently has no reputation left which can be damaged. In my view, such a doctrine only exists as part of the American law of defamation and has no application in Malaysia. In any event, the stumbling block here is s 43 of the Evidence Act 1950 and since evidence of previous convictions are inadmissible (per *Nallakaruppan*'s case), this concept becomes a non-starter. Also, whilst s 55 of the Evidence Act 1950 permits evidence relating to the plaintiff's alleged bad reputation to be admitted, that can only be done by way of evidence of general reputation and specific convictions are not admissible (see *Nallakaruppan*'s case).

OUTCOME AND THE ORDER

[125] Strictly speaking the defendant's application ('encl 97') did not involve the application of the *Yamaha* principle as the amendment application was determined on the basis of legal principles and statutory provisions. The outcome is that as a result of the several legal (common law), statutory and case law prohibitions, the defendant's application did not pass muster. For the reasons as stated above, encl 97 is dismissed with costs. I ordered the defendant to pay costs of RM5,000 to the plaintiff. The action was stayed and trial dates were vacated pending the defendant's appeal to the Court of Appeal, which counsel for the defendant has indicated will be pursued expeditiously.

Enclosure 97 dismissed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar